No. 86-1637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PETER I. WALDMANN,

Petitioner,

v.

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORPORATION, and as Receiver,

Respondent.

SUPPLEMENTAL APPENDIX

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SIDNEY L. JAFFE, et al.,

Plaintiffs,

– vs. –

E. L. EASTMOORE, et al.,

Defendants.

ORDER

At the status conference held September 20, 1984, defendant orally requested that the Court reconsider defendant GRANT's motion for final judgment. The Court granted defendant GRANT's request and scheduled a hearing on the motion for final judgment for September 28, 1984. At the hearing the parties appeared through counsel. Having reconsidered the motion, the Court finds that for the reasons stated below, the motion should be granted.

Background

On September 9, 1981, defendant GRANT filed a two-count counterclaim against plaintiffs. On October 14, 1982, the Court entered an Order striking plaintiffs' answer and defenses to defendant GRANT's counterclaim and entered a default against plaintiffs on the liability issues raised by the counterclaim.

At the status conference of September 20, 1984, defendant GRANT voluntarily dismissed Count I of the counterclaim and requested that the Court reconsider the motion for final judgment as to Count II only. Accordingly, the only issue remaining for resolution by the Court is the relief to which defendant Grant is entitled under Count II of the counterclaim.

In Count II of the counterclaim, defendant GRANT seeks to enforce the Final Default Judgment entered March 10, 1981,

by the Circuit Court of Putnam County, Florida, in the Case of *Barbara Raymond, et al. v. Continental Southeast Land Corp., et al.*, Circuit Court in and for Putnam County, Florida, Case No. 78-416, in which the court ordered Atlantic Commercial Development Corporation ("ACDC"), Ruby Mountain Construction & Development Corp. ("RM"), and Meadow Valley Ranchos, Inc. ("MVR") to account for and pay to defendant GRANT all sums collected by those corporations from contract vendees of Continental Southeast Land Corp. ("CSEL") and reserved jurisdiction to award damages in the event such monies were not paid to defendant GRANT. Additionally, defendant GRANT alleged that ACDC, MVR and RM were controlled by Sidney L. Jaffe to the extent that those corporations were simply his alter ego and that the corporations were operated by him as mere instrumentalities for the purpose of perpetrating a fraud upon the creditors of CSEL and defendant GRANT. The relief sought by defendant GRANT in Count II of his counterclaim in this action was the accounting ordered in the Final Default Judgment described above and damages against ACDC, MVR, RM and Sidney L. Jaffe, jointly and severally.

The parties have filed extensive portions of the trial and appellate court records from the *Barbara Raymond* case which evidence the facts described below relating to that case.

After entry of the final default judgment, ACDC, MVR and RM, whose president in each case is Sidney L. Jaffe, refused to account to defendant GRANT pursuant to the final default judgment in the *Barbara Raymond* action and refused to pay to him the sums they collected from the contract venders of CSEL.

Defendant Grant served requests for admissions on ACDC, MVR and RM, in the *Barbara Raymond* action, requesting that they admit they had collected more than $3 million from contract vendees of CSEL. In response to the request, ACDC, MVR, and RM filed dilatory and evasive responses to the requests for admissions. Accordingly, the state court struck their responses to the requests for admissions and deemed the statements admitted. ACDC, RM and MVR appealed that ruling and the Florida Fifth District Court of Appeal affirmed the trial court.

Ruby Mountain Construction & Development Corp. v. Barbara Raymond, 409 So.2d 525 (Fla. 5the DCA 1982).

After the affirmance by the appellate court, defendant GRANT filed a motion before the trial court seeking entry of a judgment of $3 million against ACDC, RM and MVR based upon the admitted statements described above. After due notice to all parties, a hearing was held. ACDC, MVR and RM were represented by counsel at the hearing but presented no evidence in opposition to the motion and did not contest in any way the amount of the judgment. They simply contended that the state court was without jurisdiction. Accordingly, on April 28, 1982, the *Barbara Raymond* court entered the supplemental final judgment for defendant GRANT and against ACDC, MVR and RM, jointly and severally, in the amount of $3 million plus additional sums as accumulated contempt fines and for attorneys fees incurred by defendant GRANT in connection with that action.

ACDC, MVR and RM appealed the supplemental final judgment to the Fifth District Court of Appeal of Florida. That court dismissed the appeal as frivolous and assessed attorneys fees against the appellants and their counsel for having filed and prosecuted the appeal in bad faith. ACDC, MVR, and RM did not seek further review of the order dismissing the appeal, and the supplemental final judgment is now final and non-appealable.

On October 19, 1982, defendant GRANT filed his Motion for Final Judgment in this action in which he contended that under the court's order of October 14, 1982, the supplemental final judgment, and the principles of res judicata and full faith and credit, he was entitled to judgment as a matter of law against ACDC, MVR, RM and Sidney L. Jaffe, jointly and severally, in the amount of $3 million plus accrued interest.

In opposition to defendant GRANT's motion, plaintiffs argued that the supplemental final judgment is not entitled to full faith and credit and has no res judicata effect for three reasons:

(a) The $3 million supplemental final judgment was not an "adjudication on the merits."

(b) Rule 1.370(b), *Florida Rules of Civil Procedures*, and Rule 36(b), *Federal Rules of Civil Procedure*, preclude the court from giving full faith and credit or res judicata effect to the supplemental final judgment because it was based upon admissions which could not be used in any proceeding other than the *Barbara Raymond* action.

(c) The supplemental final judgment was based upon the final default judgment which preceded it and the final default judgment in turn was based upon plaintiffs' refusal to comply with orders they contend were void because the state court supposedly had been deprived of jurisdiction over them by virtue of CSEL's filing a Chapter IX petition in bankruptcy.

Plaintiffs do not assert that there are any issues of disputed fact and all of the issues raised by the motion for final judgment and plaintiffs' response to the motion are issues of law. For the reasons stated below, the issues raised by plaintiffs are insufficient as a matter of law to preclude entry of a final judgment in favor of defendant GRANT.

Order

The Court has personal jurisdiction over the parties hereto, specifically including Sidney L. Jaffe, and jurisdiction over the subject matter of defendant GRANT's counterclaim.

The supplemental final judgment is a final judgment of the State of Florida which has been appealed and upheld by virtue of the appellate court's dismissal of the appeal as frivolous. Accordingly, the judgment is entitled to full faith and credit under Article IV, Section 1, United States Constitution, and 28 U.S.C. § 1738. Additionally, the judgment is entitled to the benefits of the doctrine of res judicata not only against ACDC, MVR, and RM, but also those in privity with them. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 n. 6 (1982); *Dudley v. Smith*, 504 F.2d 979, 982-83 (5th Cir. 1974); *Moyer v. Mathas*, 458 F.2d 431, 434 (5th Cir. 1972). Because Sidney L. Jaffe was found by virtue of the court's October 15, 1982, order to be the alter ego of ACDC, MVR and RM, he was and is in privity with those

corporations for purposes of being bound by the supplemental final judgment under the principles of res judicata. *Dudley v. Smith*, *supra*, at 982-83. *See also*, *Cotton v. Federal Land Bank of Columbia*, 676 F.2d 1368, 1370 (11th Cir. 1982); *Drier v. Tarpin Oil Co.*, 522 F.2d 199, 200 (5th Cir. 1975); *Hyman v. Regenstein*, 258 F.2d 502, 511-12 (5th Cir.) *cert. den.* 359 U.S. 913 (1959).

Plaintiffs' first argument that the supplemental final judgment was not an adjudication on the merits is based solely on their contention that an "adjudication on the merits" requires for res judicata purposes that there be a "trial on the merits." This argument is unsupported by case law, is directly contradicted by all applicable case law and is frivolous. *See*, *Last Chance Milling Co. v. Tyler Mining Co.*, 157 U.S. 683, 691-92 (1895); *Moyer v. Mathas*, *supra*, at 434; *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 332 F.2d 135 (5th Cir.) *cert. den.* 379 U.S. 915 (1964); *Jackson v. Hayakawa*, 605 F.2d 1121, 1125, n.3 & 4 (9th Cir.) *cert. den.* 445 U.S. 952 (1980); *Mayer v. Distel Tool & Machine Co.*, 556 F.2d 798 (6th Cir. 1977). Plaintiffs' contention that the supplemental final judgment is unenforceable because there was no "trial on the merits" is particularly disingenuous in view of the fact that it was the plaintiff corporations' own misconduct in the state court action which prevented any trial on the merits and caused the entry of the $3 million judgment against them.

Plaintiffs' second argument is equally frivolous. Plaintiffs do not and cannot contend that defendant GRANT has attempted to introduce into evidence in this case the statements deemed admitted in the *Barbara Raymond* case. Defendant GRANT has sought in this case to enforce the Supplemental Final Judgment which was rendered on the merits based upon the *only* evidence before the state court as to the amounts of money collected by ACDC, MVR and RM from the contract vendees of CSEL. That judgment is entitled to full faith and credit and is res judicata for the reasons stated above, and Rule 1.370(b), *Florida Rules of Civil Procedure*, and Rule 36(b), *Federal Rules of Civil Procedure*, have no applicability whatsoever to defendant GRANT's motion for final judgment.

Plaintiffs' third defense to defendant GRANT's pending motion is also without merit. In the first place, the defense as set forth in their memorandum in opposition to motion for final judgment constitutes an attempt by plaintiffs to resurrect the allegations of paragraphs 16, 20 through 30, and 49 of their amended complaint which they asserted as an affirmative defense to defendant GRANT's counterclaim in their Reply to Counterclaim served October 22, 1981. This Court's order of July 14, 1982, granting plaintiffs' motion to dismiss as to defendant GRANT also enjoined plaintiffs from "any further prosecution of the subject matter hereof as to defendant Grant" until the Court determined and plaintiffs paid defendant GRANT's attorneys fees and costs incurred in defending this action. Since plaintiffs have not paid the attorneys fees awarded to defendant GRANT by the Court, they are barred from asserting the subject matter of their complaint as a defense against defendant GRANT's counterclaim. Moreover, the Court's order of October 14, 1982, specifically struck all of plaintiff's defenses including this defense.

Plaintiffs' third defense to defendant GRANT's motion was also raised unsuccessfully by plaintiffs before both the trial court and the appellate court in *Barbara Raymond* in both interlocutory motions and appellate proceedings which were all resolved against plaintiffs. ACEDC, MVR and RM also raised the exact same argument in opposition of defendant GRANT's motion for entry of the $3 million judgment and in the appeal of that judgment which was dismissed by the Florida appellate court as frivolous. ACDC, MVR and RM also made the same argument in an adversary complaint filed against defendant GRANT in the bankruptcy court seeking removal of defendant GRANT as trustee for CSEL. That adversary proceeding was dismissed with prejudice as a result of Sidney L. Jaffe's failure to appear to be deposed pursuant to notice and an order compelling discovery by the bankruptcy court. In their memorandum in opposition to motion for final judgment, plaintiffs contended that "the jurisdictional issue has never been fully litigated." Plaintiffs' memorandum, p.4. For the reasons stated above, that contention is false. Having unsuccessfully asserted this argument before the state trial and appellate courts and the bankruptcy

court, plaintiffs are barred by the doctrine of res judicata from relitigating that issue in this action.

Finally, plaintiffs' contention that the Court should not give full faith and credit and res judicata effect to the supplemental final judgment because it is premised upon the final default judgment which was predicated on the prior order striking the pleadings of and entering a default against ACDC, MVR, and RM for their violation of two previous orders which were purportedly void because the court lacked subject matter jurisdiction to enter the two previous orders is simply an attempt to extend beyond all rational bounds the legal principle that a judgment entered without subject matter jurisdiction is void and may be subject to collateral attack. The undisputed fact is that the *Barbara Raymond* court had subject matter jurisdiction on March 10, 1981, when it entered the Final Default Judgment and on April 27, 1982, when it entered the Supplemental Final Judgment. Therefore, even if plaintiffs were correct and the *Barbara Raymond* court erred in relying upon the plaintiffs' failure to comply with the previous orders in entering the Final Default Judgment, that error is not a jurisdictional matter and could only have been corrected, if at all, on direct appeal. *See Parker Bros. v. Fagan*, 68 F.2d 616, 618 (5th Cir. 1934); *Malone v. Meres*, 109 S. 677, 684-89 (Fla. 1926).

The Court has also reconsidered plaintiffs' motion for partial summary judgment on the issue of damages which can be construed as asserting additional defenses to defendant GRANT's motion for final judgment. Nevertheless, the Court finds that the motion for partial summary judgment was properly denied and raises neither any genuine issues of material fact nor any matters of law sufficient to avoid entry of a final judgment for defendant GRANT.

In the first place, the issues raised by the motion for partial summary judgment constitute affirmative defenses of compromise and settlement and setoff.

The compromise and settlement defense was raised by the factual allegations of the plaintiffs' amended complaint which, as

incorporated into plaintiffs' reply to defendant GRANT's counterclaim, were stricken by the Court's order of October 14, 1982, and plaintiffs cannot resurrect those defenses on the grounds that they are challenging the *amount* of damages to which defendant GRANT is entitled under Count II of the counterclaim. Second, it is apparant from the record that the settlement agreement preceded entry of the final default judgment and the supplemental final judgment in *Barbara Raymond* and, accordingly, could have and should have been raised as defenses in that action if it was to be raised at all. Having failed to raise that defense in the *Barbara Raymond* action, plaintiffs are now barred by the doctrine of res judicata from attempting to assert it as a defense in this action. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982). Finally, despite plaintiffs' attempts to characterize the security agreement as constituting a full and complete compromise and settlement of all of the disputes between the parties, the agreement provides on its face that it was to be merely an executory accord until performed by all parties and the parties further agreed that the statute of limitations on defendant GRANT's claim against plaintiffs would be tolled during the period of performance of that agreement. Therefore, defendant GRANT was not barred by the settlement agreement from asserting, after the plaintiff corporations' breach of that settlement agreement, all claims he had to the fraudulently conveyed property. *E.g.*, *Hannah v. James A. Ryder Corp.*, 380 So.2d 507 (Fla. 3d DCA 1980).

Plaintiffs also claim the bankruptcy court had the sole jurisdiction to determine the effect of the settlement agreement. The settlement agreement does provide that MVR, RM and ACDC submit to the jurisdiction of the bankruptcy court for purpose of settling their disputes with the trustee arising out of any breach of settlement agreement and any such claim "may" be brought in the bankruptcy court. Nothing in the settlement agreement provided that the bankruptcy court would have exclusive jurisdiction over any disputes arising out of the breach of the settlement agreement and such a determination would be inconsistent with the executory accord language of the settlement agreement. Moreover, the record reflects that after entry of the final default

judgment but prior to entry of the supplemental final judgment, plaintiffs filed an action in the bankruptcy court against defendant GRANT, alleging that he breached the settlement agreement. As noted above, that action was dismissed with prejudice for the plaintiff corporations' failure--specifically the failure of Sidney L. Jaffe as president of each of the plaintiff corporations--to submit to discovery.

With respect to plaintiffs' claims that they are entitled to setoff for the value of 40 lots conveyed to defendant Grant under the settlement agreement, an alleged $45,000 paid to defendant GRANT under the settlement agreement, and for some unspecified amount based upon the subordination of the claims of ACDC and MVR in the bankruptcy court, these issues are also a matter of defense which could have and should have been raised in the State court and do not constitute a valid objections to the court's awarding damages based upon the supplemental final judgment. Additionally, these matters were never pled by plaintiffs as defenses to the counterclaim. In any event, even if they had been pled and could be properly considered in determining the damages to which defendant GRANT is entitled under Count II, the record reflects that the property for which plaintiffs claim a setoff is part of the same property which was fraudulently conveyed to plaintiffs in the first place under the fraudulent conveyances voided by the final default judgment. Accordingly, plaintiffs would be entitled to be setoff for the value of that property.

With respect to plaintiffs' claim to a setoff of $45,000, there is no evidence in the record that plaintiffs paid any money to defendant GRANT. However, defendant GRANT concedes in his memorandum that he received the $25,000 down payment under the settlement agreement. The record does reflect that plaintiffs have paid neither the contempt fines described in the supplemental final judgment nor the attorneys fees awarded to defendant GRANT by the court's order of November 11, 1982. Accordingly, to the extent that plaintiffs might be entitled to a setoff claim of $25,000 against defendant GRANT, that setoff does not diminish their liability to defendant GRANT under the supplemental final judgment.

Plaintiffs' claim that the agreement of MVR and ACDC to subordinate their claims in the bankruptcy proceeding and that that subordination had some unspecified value is defeated by the fact that the record reflects that the bankruptcy court disallowed those claims without any objection by ACDC or MVR.

Although the Court has not previously ruled on the motions to continue, abate and stay, filed by Lansing J. Roy, Esquire, on behalf of all plaintiffs, those motions do not require that the court defer ruling on defendant GRANT's motion for final judgment for several reasons. First, the only issue remaining for resolution by the Court is the amount of damages which issue is determined by the sums collected by the plaintiff *corporations*. Those corporations have no Fifth Amendment privilege which would even support let alone require the Court to stay a ruling on defendant GRANT's motion. *Bellis v. United States*, 417 U.S. 85 (1974). Second, any Fifth Amendment privilege which might have been raised by any of the parties has been waived by plaintiffs' failure to timely assert such privilege in response to defendant GRANT's discovery or even prior to the hearing on all pending discovery motions before the magistriate on September 4, 1984. *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981). Third, there has been no showing that plaintiffs would be prejudiced by the Court's ruling on the motion for final judgment which has been exhaustively briefed by the parties and has been pending for almost two years. Only if the motion had been denied would it be necessary for the Court to weigh the claimed prejudice to Sidney L. Jaffe from proceeding to trial of this case against the prejudice to defendant GRANT of staying an action which has now been pending for more than three years. Finally, it is apparent from the motions themselves that the criminal proceedings which Sidney L. Jaffe now contends require the Court to abate or stay this action have been pending since at least July 8, 1983, when the information was filed against him. There has been no explanation as to why Sidney L. Jaffe failed to promptly assert his Fifth Amendment privilege or file the pending motions to abate. *United States v. Kordell*, 397 U.S. 1 (1970).

Finally, the Court feels compelled to comment upon plaintiffs' continued failure even after the default on the liability issue was entered against them to comply with discovery requests initially served by defendant GRANT in October and November, 1981, which have been the subjects of orders compelling plaintiffs to comply with such discovery or to comply with any of defendant GRANT's discovery requests served on plaintiffs since entry of the default. Notwithstanding plaintiffs' claim in the Compliance document that they filed with the Court on the eve of the hearing to determine appropriate sanctions for plaintiffs' discovery abuses, plaintiffs have refused to submit to discovery on the key issues of this litigation and have produced no documents and answered no interrogatories since entry of the October 14, 1982, order. Most importantly, plaintiffs have continued their refusal to answer interrorgatory 25 of defendant GRANT's first set of interrogatories served on each of the plaintiffs on October 21, 1981. In that interrogatory, defendant GRANT requested that plaintiffs state the total amount of money collected by each of the plaintiff corporations from contract vendees of CSEL and the present location of all such sums. Plaintiffs first answered that interrogatory by referring to their response to defendant GRANT's request to produce in which plaintiffs objected to the production of the documents which might have contained the information necessary to answer interrogatory 25. When the Court ordered plaintiffs to answer interrogatory 25, MVR and RM answered the interrogatory by stating they had collected no money from contracted venders and ACDC answered by saying, "See printouts and summaries already produced." When defendant GRANT filed a second renewed motion for sanctions on the grounds, among others, that plaintiffs had still failed to answer interrogatory 25 or produce documents which they had been compelled to produce and after the Court had granted defendant GRANT's motion and scheduled a hearing to determine appropriate sanctions, plaintiffs served additional answers to interrogatories in which they continued to refuse to answer interrogatory 25 and instead contended that RM had delivered to the trustee records from which the total

sum collected by plaintiff could be computed. However, in the Compliance document filed simultaneously with the additional answers to interrogatories, plaintiffs admitted that they had not furnished to defendant GRANT documents for the entire period during thich they had collected monies from contract vendees of CSEL. To this date, plaintiffs have never stated the total dollar amount they collected from contract vendees nor have they accounted to defendant GRANT for any of the proceeds of their collection efforts, and there is absolutely no evidence in the record from which the Court could calculate any amount of damages other than the $3 million amount stated in the supplemental final judgment. If plaintiffs seriously contested the fact that they collected less that $3 million, the obvious method of proving that fact would be to state the amount of money they had, in fact, collected, and produce the documents which would establish that fact. Plaintiffs have done neither and the Court can only conclude that they have never had any intention of either accounting to defendant GRANT as they are obligated to do by the Final Default Judgment and this Court's Order of October 14, 1982, and that they have willfully and intentionally refused to comply with their discovery obligation in this action in an effort to frustrate, hinder and delay the Court from entering a final judgment.

Based upon the facts contained in the record and the issues raised by the parties, defendant GRANT is entitled to a judgment as a matter of law in the amount of $3 million, plus interest from the date of the supplemental final judgment at the rate of 12% per annum pursuant to Section 55.03, *Fla. Stat.* Accordingly, it is

ORDERED AND ADJUDGED:

1. Defendant GRANT's motion for final judgment is GRANTED.

2. The Court will enter a separate judgment pursuant to this Order.

DONE AND ORDERED in Chambers at Jacksonville, Florida this 2 Day of October, 1984.

/S/JOHN H. MOORE II

UNITED STATES DISTRICT JUDGE

Copies to:

All counsel of record